MAHFAR ALWEE A

v.

JEJAKA MEGAH SDN BHD & ANOR

HIGH COURT MALAYA, MELAKA B
LOW HOP BING J
[CIVIL SUIT NO: MT1-22-40-2002]
18 OCTOBER 2006

CIVIL PROCEDURE: *Discovery - Inspection of documents - Application for - Notice to produce documents - Whether documents sought relevant to plaintiff's cause of action - Whether action founded on contract or fiduciary duties and implied trust - Whether application without merit - Whether dismissed* C

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The plaintiff *vide* application by way of summons in chambers in encl. 30 originally sought a variety of orders but has subsequently prayed for an order requiring the first and second defendants to produce, at the office of the plaintiff's solicitors, documents for the plaintiff to make notes and copies thereof upon payment of reasonable fees, and in the event of the defendants' failure to comply therewith, to strike out the defence and enter judgment for the plaintiff. The plaintiff's affidavit in support averred that he was the purchaser of a low cost house in a housing project for which he had paid RM23,782 representing 60% of the purchase price. The housing project was abandoned but was subsequently taken over by the first defendant ('D1') to whom the second defendant ('D2') had given a loan of RM3.2 million with a view to rehabilitation, completion and delivery of vacant possession to the purchasers including the plaintiff. It was the allegation of the plaintiff that D1 had completed the project but had instead sold the plaintiff's house to a third party. The plaintiff commenced the instant suit as an equitable and beneficial owner of the house. On 5 March 2003, pursuant to O. 24 r. 10 of the Rules of the High Court 1980, the plaintiff served on D1's solicitors a notice to produce, *inter alia*, the following documents (i) agreement between D1 and D2; and (ii) D1's letter of offer to plaintiff. On the same mentioned date, also pursuant to O. 24 r. 10, the plaintiff's solicitors served on D2's solicitors a notice to produce a variety of documents such as the deed of assignment between D1 and D2 and the debenture between D1 and D2. It was D1's contention that the documents sought by the plaintiff were not relevant to the plaintiff's cause of action which was not based on E F G H I

A contract but on breach of fiduciary duties and implied trust. D2 also argued, *inter alia*, to the same effect in that the plaintiff's claim against D2 was founded on equity *ie*, implied trust and equitable principles. The issue for determination was whether the documents sought by the plaintiff were relevant to his cause of action.

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Held (dismissing plaintiff's application with costs):

(1) Notwithstanding the absence of an affidavit in reply by D1, this court was of the view that D1 was at liberty to rely and be heard on the law for the purpose of launching an objection to the plaintiff's application. Hence, the plaintiff's application and D1's objection thereto must be heard on merits. (para 17)

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(2) The documents sought by the plaintiff were essentially documents founded upon the law of contract; this court was unable to find any relevance of these documents when the plaintiff's cause of action was not founded on contract but on fiduciary duties and implied trust. The plaintiff's application was therefore without any merit. (para 26)

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Case(s) referred to:

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 HC ***(refd)***

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1985] SCR 353 ***(refd)***

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Dawkins v. Prince Edward of Saxe Weimar [1875-76] 1 QBD 499 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Yekambaran Marimuthu v. Malayawata Steel Berhad [1994] 2 CLJ 581 HC ***(refd)***

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Legislation referred to:

Rules of the High Court 1980, O. 3 r. 6, O. 18 r. 19(1)(a), (b), (c), O. 24 rr. 1(1), 10(1), (2), 11(1), 13(1), O. 92 r. 4

For the plaintiff - Mogan Karupiah; M/s Mogan Karupiah
For the 1st defendant - Bala Gopal; M/s Bala Gopal & Assoc

H *For the 2nd defendant - Lu Kee Chee; M/s Rashid & Lee*

Reported by Suhainah Wahiduddin

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JUDGMENT

Low Hop Bing J:

Application

[1] The plaintiff *vide* application by way of summons in chambers in encl (30) has originally sought a variety of orders, but has subsequently prayed for an order requiring the first and second defendants to produce, at the office of the plaintiff's solicitors, documents for the plaintiff to make notes and copies thereof upon payment of reasonable fees, and in the event of the defendants' failure to comply therewith, to strike out the defence and enter judgment for the plaintiff.

Factual Background

[2] Six plaintiffs, including the plaintiff herein, have on 15 February 2002 filed six separate civil suits against the defendants. These suits were consolidated on 22 May 2003.

[3] The parties have consented to treat the decision in the instant suit as binding on the other five suits.

[4] The plaintiff's affidavit in support averred that he was the purchaser of a low cost house in a housing project for which he had paid RM23,782 representing 60% of the purchase price. The housing project has since been abandoned but was subsequently taken over by the first defendant ("D1") to whom the second defendant ("D2") has given a loan of RM3.2 million with a view to rehabilitation, completion and delivery of vacant possession to the purchasers including the plaintiff.

[5] The plaintiff alleged that D1 had completed the project but had instead sold the plaintiff's house to a third party. The plaintiff has commenced the instant suit as an equitable and beneficial owner of the house.

[6] In the defence, both the defendants denied any responsibility or trust in favour of the plaintiff.

[7] On 5 March 2003, pursuant to O. 24 r. 10 of the Rules of the High Court 1980, the plaintiff served on D1's solicitors a notice to produce, *inter alia*, the following documents:

(1) Order of the court dated 15 September 1992 in Melaka High Court SP 24-205-1991;

(2) Transfer Form from Lock Kim Lian to D1;

(3) D1's application to D2 for a term loan repayable with interest for 18 months;

(4) Agreement;

(5) Letter dated 1 October 1996;

(6) Agreement between D1 and D2; and

(7) D1's letter of offer to plaintiff.

[8] On 5 March 2003, also pursuant to O. 24 r. 10, the plaintiff's solicitors served on D2's solicitors a notice to produce a variety of documents including:

(1) Agreement between D1 and D2;

(2) Evaluation Report Reference No. "TPPT/A-025/HQ 0074" by Ernst & Young;

(3) Debenture between D1 and D2;

(4) Deed of assignment between D1 and D2; and

(5) First charge by D1.

D1'S Right To Object

[9] Mr. Mogan Karupiah learned counsel for the plaintiff submitted that by reason of D1's failure to file an affidavit in reply, D1 has lost the right to object to the plaintiff's application herein, relying on:

(1) *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA;

(2) *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1985] SCR 353 SC; and

(3) *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339 HC.

[10] D1's learned counsel Mr. Bala Gopal has deemed it unnecessary to reply to the above submission.

[11] The merits of the plaintiff's submission will no doubt be apparent after my analysis of the authorities referred to above.

[12] First, in *Ng Hee Thoong, supra*, the two appellants-guarantors ("the guarantors") gave their address in the guarantee as 83, Jalan Iskandar, Ipoh. Their liability depended on the making of demand upon them by the respondent-bank ("the bank"). Upon default of payment, the bank sent a letter of demand, addressed to the first guarantor at 86 Jalan Theatre Ipoh while that addressed to the second guarantor bore the address of No 5 Jalan Chung Ah Moi, Chateau Garden, Ipoh. Hearing nothing from the guarantors, the bank issued a writ and statement of claim against, *inter alia*, the guarantors and obtained judgment in default of appearance against them. Subsequently, the guarantors succeeded in applying to set it aside, and then delivered their defence. About 15 months later, the bank took out a summons for summary judgment, to which the guarantors opposed by way of an affidavit asserting that they had not received any demand from the bank and that the bank had not given them one month's notice of intention to proceed as required under O. 3 r. 6 in view of the delay exceeding one year since the last proceedings. The bank did not file any affidavit in reply.

[13] The Court of Appeal through the judgment of Gopal Sri Ram JCA, referred to *Alloy Automotive, supra*, and set out the well settled principle, governing the evaluation of affidavit evidence, that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

[14] *Alloy Automotive, supra*, concerns the respondent's (plaintiff's) application for specific performance by way of summary judgment under O. 81. The appellant (defendant) in opposing the application filed an affidavit setting out the facts relating to the variation of the sale and purchase agreement to which the plaintiff did not answer. On this issue, Lee Hun Hoe CJ (Borneo) (as he then was) speaking for the Supreme Court at p 358e held that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted, citing *Dawkins v. Prince Edward of Saxe Weimar* [1875-76] 1 QBD 499 per Blackburn J.

[15] In *Abdul Razak Ahmad, supra*, the plaintiff filed an originating summons seeking declaratory reliefs. The defendant filed an affidavit to which the plaintiff did not reply. The defendant then filed an application by way of summons in chambers to strike out the plaintiff's originating summons on the grounds *inter alia* that

the plaintiff's failure to file an affidavit in reply to that filed by the defendant was fatal and the court should exercise its discretion under O. 92 r. 4. Abdul Malik Ishak J also followed *Alloy Automotive, supra*, and held *inter alia* that as the whole case had to be decided on affidavit evidence alone, the plaintiff should have filed an affidavit in reply, and that the plaintiff's failure to do so meant that he had admitted to the defendant's allegations.

[16] The principle which has been enunciated with unrivalled clarity in all the abovesaid three authorities does not appear to be so broad or extensive as to lend any support to the defendant's abovesaid proposition.

[17] Notwithstanding the absence of an affidavit in reply by D1, I am of the view that D1 is at liberty to rely and be heard on the law for the purpose of launching an objection to the plaintiff's application.

[18] Hence, I hold that the plaintiff's application and D1's objection thereto must be heard on merits.

Discovery And Inspection Of Documents

[19] It was submitted for the plaintiff that the plaintiff's action was against D2 as a public company entrusted with public funds carrying out public duties of a fiduciary nature, relying on:

(1) O. 24 r. 1(1), r. 10(1) and (2) and r. 11(1);

(2) *Yekambaran s/o Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581 HC; and

(3) my judgment in Melaka High Court Civil Suit MT1-22-40-2002 on encl (21) herein which was delivered on 19 March 2004 ("my judgment on encl (21)").

[20] D1 contended that the documents sought by the plaintiff were not relevant to the plaintiff's cause of action which was not based on contract but on breach of fiduciary duties and implied trust.

[21] Learned counsel for D2, Miss Lu Kee Chee argued, *inter alia*, to the same effect in that the plaintiff's claim against D2 is founded on equity ie, implied trust and equitable principles.

[22] I would first of all set out the principles governing the grant or refusal of an order for the discovery and inspection of documents under O. 24, as follows:

(1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of O. 24, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action: O. 24 r. 1(1); *Yekambaran, supra,* per Edgar Joseph Jr (later FCJ);

(2) Any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the notice giver and to permit him to take copies thereof: O. 24 r. 10(1);

(3) The party on whom a notice is served under O. 24 r. 10(1) must, within four days after serving of the notice, serve on the notice giver a notice in Form 44 stating a time within seven days after the service thereof at which the documents or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds: O. 24 r. 10(2);

(4) If a party who is served with a notice under O. 24 r. 10(1):

(a) fails to serve a notice under O. 24 r. 10(2); or

(b) objects to produce any document for inspection; or

(c) offers inspection at a time or place such that in the opinion of the court it is unreasonable to offer inspection then or, as the case may be, there,

then, subject to O. 24 r. 13(1), the court may, on the application of the party entitled to inspection, make an order in Form 45 for the production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit: O. 24 r. 11(1).

(5) Edgar Joseph Jr J (later FCJ) in *Yekambaran, supra,* enunciated that the essential elements of an order for discovery are threefold *viz*:

A (a) there must be a "document";

(b) the document must be "relevant; and

(c) the document must be or have been in the "possession, custody or power" of the person against whom the order for discovery is sought; and

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(6) our Rules of the High Court 1980 limit discovery to documents which are relevant to or relate to the factual issues in dispute.

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[23] Of all the above principles, the most significant are principles (5)(b) and (6)which I hereby apply.

[24] Reverting to the above submissions, it is apparent to me that the sole question for determination in the instant application is whether the documents sought by the plaintiff are relevant to his cause of action. In this regard, I am of the view that the plaintiff bears the burden of proving relevancy.

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[25] For this purpose, I shall refer to my judgment on encl (21) in relation to D2's summons in chambers which sought to strike out the plaintiff's writ and statement of claim herein under O. 18 r. 19(1)(a), (b) or (c). In essence, I held that D2 owed fiduciary duties to the plaintiff to carry out the housing project to completion and subsequent delivery thereof to the purchasers including the plaintiff, as a result of which the plaintiff's statement of claim had disclosed a reasonable cause of action based on an implied trust in favour of the plaintiff, thereby saving the plaintiff's claim from being struck out under O. 18 r. 19(1)(a), (b) or (c).

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[26] It is to be noted that the documents sought by the plaintiff are essentially documents founded upon the law of contract; and I am unable to find any relevance of these documents when the plaintiff's cause of action was not founded on contract but on fiduciary duties and implied trust. The plaintiff's application is therefore without any merit.

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Conclusion

[27] On the foregoing grounds, I dismiss the plaintiff's application with costs.

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